

# Rules and Regulations

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**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Part 772****[FHWA Docket No. 96-26]****RIN 2125-AD97****Procedures for Abatement of Highway  
Traffic Noise and Construction Noise****AGENCY:** Federal Highway  
Administration (FHWA), DOT.**ACTION:** Interim final rule; request for  
comments.

**SUMMARY:** This document revises the FHWA regulation that allows Federal participation for Type II noise abatement projects. Type II projects are proposed Federal or Federal-aid highway projects for noise abatement on an existing highway. This revision will make the regulation consistent with the National Highway System Designation Act of 1995 (NHS). This action will restrict Federal participation for Type II projects to those that were approved before the date of enactment of the NHS legislation or are proposed along lands that were developed or were under substantial construction before approval

of the acquisition of the rights-of-way for, or construction of, an existing highway.

**DATES:** This interim final rule is effective September 30, 1996. Written comments must be received on or before November 27, 1996.

**ADDRESSES:** Submit signed, written comments to FHWA Docket No. 96-26, Federal Highway Administration, Office of the Chief Counsel, Room 4232, HCC-10, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Armstrong, Office of Environment and Planning, (202) 366-2073 or Mr. Robert Black, Office of the Chief Counsel, (202) 366-1359, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Type II projects are not mandatory requirements of 23 CFR Part 772, but are proposed solely at the option of a State highway agency. By the end of 1992, 17 States had constructed at least one Type II project.

The FHWA believes that highway traffic noise should be reduced through a program of shared responsibility and, thus, has encouraged State and local governments to practice noise compatible land use planning and control in the vicinity of highways. However, lands immediately adjacent to highways frequently have been developed without proper regard for traffic noise impacts. Later, State highway agencies have constructed Type II noise barriers to abate these impacts. Since 1976, the FHWA noise regulations have required local officials to take measures to exercise land use control over undeveloped lands adjacent to highways to prevent development of incompatible activities before FHWA funds could normally be used to abate noise impacts upon land uses which came into existence after May 14, 1976.

In the recently passed NHS legislation (Pub. L. 104-59, 109 Stat. 605), Congress limited Federal participation in Type II projects to those which were already approved or future projects where development occurred prior to the construction of an existing highway. Thus, the FHWA is amending Part 772

to be consistent with the NHS legislation.

Federal participation in noise abatement measures will only be approved for projects that were approved before November 28, 1995, the date of enactment of the NHS, or for projects that are proposed along lands that were developed or were under substantial construction before approval of the acquisition of the rights-of-way for, or construction of, an existing highway. Land development or substantial construction must have predated the existence of any highway. The granting of a building permit, filing of a plat plan, or a similar action must occur prior to right-of-way acquisition or construction approval for the original highway.

In addition, the amendment provides that Federal participation in Type II abatement will be prohibited for lands or activities where Type I abatement has been previously determined not to be reasonable and feasible. This makes explicit that which is implicit in the noise regulations. If a noise abatement project does not qualify as reasonable and feasible when proposed as a Type I project, it won't later qualify as reasonable and feasible when proposed as a Type II project.

##### **Rulemaking Analyses and Notices**

The FHWA has determined that prior notice and opportunity for comment are unnecessary under 5 U.S.C. 553(b)(3)(B) because this interim final rule incorporates into the regulations the language of the NHS statute. In addition, the FHWA has determined that prior notice and opportunity for comment are not required under the Department of Transportation's regulatory policies and procedures, as it is not anticipated that such action would result in the receipt of information that would substantially change the regulation, since the revised rule incorporates a legislative change.

##### **Executive Order 12866 (Regulatory Planning and Review) and Department of Transportation Regulatory Policies and Procedures**

The FHWA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the Department of Transportation Regulatory Policies and Procedures. The amendment clarifies some of the requirements for Federal participation in noise abatement projects for the 17 States that have constructed at least one Type II noise barrier. It is anticipated that the economic impact of the rulemaking will be minimal; therefore, a

full regulatory evaluation is not required.

##### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), the FHWA has evaluated the effects of this rule on small entities. Based on the evaluation, the FHWA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities. The amendment deals only with the eligibility of certain State highway noise abatement projects for Federal participation. As such, it affects only State highway agencies and not small entities.

##### **Executive Order 12612 (Federalism Assessment)**

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this action does not have sufficient federalism implications to warrant the preparation of a federalism assessment. It does not impose any new obligation or requirement on a State. It does not affect the amount of Federal transportation funds that go to a State. A State is not required to have a Type II Noise Program. A State may still expend its own funds on a noise abatement project.

##### **Executive Order 12372 (Intergovernmental Review)**

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

##### **Paperwork Reduction Act**

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

##### **National Environmental Policy Act**

The agency has analyzed this action for the purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the environment.

##### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes

the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

**List of Subjects in 23 CFR Part 772**

Highways and roads, Noise control.

Issued on: August 21, 1996.

**Rodney E. Slater,**  
*Federal Highway Administrator.*

In consideration of the foregoing, the FHWA amends chapter I of title 23, Code of Federal Regulations, Part 772 as set forth below.

**PART 772—PROCEDURES FOR  
ABATEMENT OF HIGHWAY TRAFFIC  
NOISE AND CONSTRUCTION NOISE**

1. The authority citation for Part 772 is revised to read as follows:

**Authority:** 23 U.S.C. 109(h), 109(i); 42 U.S.C. 4331, 4332; sec. 339(b), Pub. L. 104-59, 109 Stat. 568, 605; 49 CFR 1.48(b).

2. In § 772.13, paragraph (b) is revised to read as follows:

**§ 772.13 Federal participation.**

(b) For Type II projects, noise abatement measures will only be approved for projects that were approved before November 28, 1995, or are proposed along lands where land development or substantial construction predated the existence of any highway. The granting of a building permit, filing of a plat plan, or a similar action must have occurred prior to right-of-way acquisition or construction approval for the original highway. Noise abatement measures will not be approved at locations where such measures were previously determined not to be reasonable and feasible for a Type I project.

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